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IN THE

Supreme Court of the United States

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US Airways, Inc.,

Petitioner,

v.

Robert Barnett,

Respondent.

On a Writ of Certiorari to the
United States Court of Appeals For the Ninth Circuit

BRIEF OF AMICUS CURIAE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Society for Human Resource Management ("SHRM"), the voice of human resource professionals for over 50 years, submits this brief in support of Petitioner US Airways, Inc.[1] SHRM represents over 160,000 human resource professionals in the United States and in 80 other countries. SHRM leads, educates, and provides a forum for human resource professionals regarding matters of critical daily importance to managing employees in the workplace. Human resource professionals develop, administer, and oversee their organizations' approach toward recruiting, training, managing, and retaining employees. Many of them are charged with ensuring that their organizations comply with the myriad of employment and equal opportunity laws. As such, SHRM members must often assist their respective organizations in developing and implementing reasonable accommodations for employees with disabilities under the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.* ("ADA").

SHRM and its members are particularly interested in this matter because human resource professionals must help make, evaluate and adapt reasonable accommodations for employees with disabilities in their organizations, while simultaneously addressing the tangible rights and legitimate expectations and aspirations of other employees, or the "affected workforce." Grasping the ADA's fluid mandates, obscured further by conflicting Equal Employment Opportunity Commission ("EEOC") interpretations and court rulings, poses a unique

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[1] *Amicus* files this brief, pursuant to Supreme Court Rule 37.3, with the consent of the parties. The parties have filed written consent for all amicus briefs with the Court. No person or entity other than *amicus curiae*, its members, or its counsel authored any portion of this brief or made any monetary contribution to the preparation or submission of this brief.

challenge to SHRM members and to anyone who manages and accommodates persons with disabilities in the workplace.

Highlighting this challenge is the case before the Court, addressing the degree to which an employer must make a "reasonable accommodation" (in this case, reassignment) forcing displacement of the seniority rights of others under an established seniority system or policy. The rule urged by Respondent and the Ninth Circuit -- that an employer may be required to circumvent an established seniority system in order to make a reasonable accommodation unless the employer can show that the displacement or exception to the rule constitutes an "undue hardship" -- places human resource professionals and their organizations in an untenable position. Such a rule runs contrary to the basic guiding principle on which human resource professionals have relied--and which they have long sought to instill in their organizations--that the law requires employers to adopt neutral, nondiscriminatory policies with respect to employment decisions, policies which are fairly and equally implemented on the basis of objective standards. Thus, a rule which respects seniority policies and other longstanding, fair and neutral workplace policies *(e.g.,* choosing the most qualified candidate for an open position), while still recognizing the need for flexibility in other areas to foster accommodations, will help human resource professionals and their organizations honor the rights of employees with disabilities under the ADA while also respecting other employees' tangible rights and legitimate expectations and aspirations.

SUMMARY OF ARGUMENT

Congress enacted Title I of the ADA to combat discrimination against individuals with disabilities and to remove barriers to equal participation and success in the workplace. The goal is equality, not special preference. The idea of suspending the tangible rights and legitimate expectations of others in the workplace in favor of effecting "reasonable accommodations" runs directly counter to the

principle of equality. Asking employers and human resource professionals to bypass more senior or more qualified employees, in order to grant transfers or more favorable shifts desired or even required by employees with a disability, is unreasonable on its face. The position of the Ninth Circuit and the EEOC -- that reasonable accommodation requests "trump" neutral, nondiscriminatory policies, such as honoring seniority or taking the most qualified individual, short of an employer's demonstration of "undue hardship" -- transforms the ADA into a mandatory preference act and skews the plain meaning of "reasonable accommodation." Such a standard produces grossly inequitable results: In violation of established policies respecting seniority and proven merit, an employer would be required to deny a particular position to a highly qualified employee with many years' seniority and experience in order to award the position to a recently hired, minimally qualified employee solely because the new employee happens to have a disability.

By requiring employees with disabilities who need an accommodation to make a threshold showing of both effectiveness and broader reasonableness, a concept which precludes trampling the rights of other employees, this Court can strike a workable balance between the equality and accommodation rights of persons with disabilities -- which fall short of a mandatory legal preference -- and the tangible rights of the "affected" workforce. Such an interpretation best serves both the plain language and the overt purpose of the ADA, to help persons with disabilities compete on an even playing field.

SHRM urges the Court to articulate a clear and workable rule, suitable for the everyday realities of the workplace and consonant with the principles of fairness and equality, that will enable employers to respect the rights and legitimate aspirations of all employees, rather than a rule that would focus solely on "reasonable accommodations" in a vacuum that disregards the "affected" workforce.

ARGUMENT

A. A "Reasonable Accommodation" Must Recognize Both the Needs of the Individual With a Disability and the Tangible Rights and Legitimate Expectations of the Affected Work Force Under Neutral, Nondiscriminatory Workplace Policies.

The plain language of ADA shows that ADA is not an affirmative action or mandatory preference act.[2] Rather, the ADA was enacted to help level the playing field and eradicate discrimination on the basis of disability (and other protected categories, such as persons regarded as having a disability). 42 U.S.C. § 12101 (a) and (b).[3] In furtherance of this goal of equality, ADA imposes its creative but nebulous "reasonable accommodation" requirement. This requirement envisions structural or other adjustments to enable qualified persons with known disabilities to perform jobs and to strive for the same performance levels and aspirations as everyone else. 42 U.S.C. §§ 12111 (9); 12112 (b) (5) (A). The ADA seeks to ensure access to equal employment opportunities based on merit; it does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities. Reasonable accommodations, therefore, should not include circumventing neutral, non-

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[2] The Congressional Findings and Purpose section of the ADA explains that "the Nation's goals regarding individuals with disabilities are to assure *equality* of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101 (a) (8) (emphasis added).

[3] The ADA states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112 (a).

discriminatory workplace policies implemented for the purpose of ensuring fairness and consistency for every employee's benefit.

This Court's decisions in other employment arenas properly emphasize the importance (and enforcement) of good faith workplace policies designed to prevent discrimination. *See e.g. Kolstad v. American Dental Association*, 527 U.S. 526, 544-45 (1999) (discussing effect of good faith policies and efforts to combat discrimination on vicarious liability for punitive damages); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (encouraging reasonable care to prevent harassment through workplace anti-harassment policies); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) (same). Such policies also help ensure the complementary interest of consistency. Yet, if the Ninth Circuit's decision and the EEOC's views are affirmed, then neutral, nondiscriminatory workplace policies will be undermined as soon as an individual requesting a "reasonable accommodation" asserts the need for an exception.[4]

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[4] The EEOC's March 1999 "Policy Guidance on Reasonable Accommodation and Undue Hardship Under the ADA ("Reasonable Accommodation Guidance") explains that an employer cannot claim that a reasonable accommodation imposes an undue hardship simply because it violates a collective bargaining agreement. *See* EEOC Reasonable Accommodation Guidance, 12 Empl. Discrim. Rep. (BNA) (March 3, 1999) (Question 45). In so doing, the EEOC automatically assumes that the legitimate rights of other employees do not even enter the "reasonable accommodation" equation, but instead can only be considered in a less predictable "undue hardship" analysis.

The same Reasonable Accommodation Guidance explain that, when reassignment to a lateral position is required as a reasonable accommodation, the request of a minimally qualified employee with a disability must be honored over the aspirations of more qualified (by virtue of seniority, experience, or performance) employee vying for the position. *See id.* Question 29. By this rule, an employer with a disability who has been with the company one day, with no prior experience or special qualifications, would be given a position which would otherwise

Certainly there must be flexibility, and some rules or *modi operandi* are invariably stretched in order to ensure equal access to employment opportunities.[5] Employers have done this routinely over the last ten years of ADA. This Court underscored this principle outside of the workplace and outside of the strict "reasonable accommodation" context in *PGA Tour, Inc. v. Martin*, No. 00-24 (slip op.) (U.S. May 29, 2001). The ultimate outcome of the fact-specific Casey Martin decision, however, was to allow Mr. Martin to compete on an equal basis -- not with an advantage over other competitors. *Id.* at 8-9, 11, 20. Uniform, nondiscriminatory policies forming the core of how to fill lateral or promotional vacancies, or how to schedule shifts, however, need not be disrupted in order to fulfill the laudable goals of opening the workplace to individuals with disabilities or keeping individuals with disabilities working and productive. Indeed, skirting such policies awards persons with disabilities an unfair advantage over other "competitors" in the workplace.

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go to an employee with 30 years on the job and considerable experience and qualifications. Again, the Reasonable Accommodation Guidance places the reasonable accommodation obligation ahead of the earned rights of others under a neutral, non-discriminatory policy. (The Guidance, however, distinguishes upward reassignments, concluding that an employee must compete for any vacant position that is considered a "promotion." *See id.*).

More recently, the EEOC issued an opinion letter on the ADA creating a hierarchy of protected classes. The letter states that the reasonable accommodation rights of a minimally qualified individual with a disability, who seeks reassignment to a vacant position, take precedence over the expectations of an equally or more qualified minority applicant under an employer's voluntary affirmative action plan. *See* EEOC Informal Opinion, January 31, 2000; Daily Labor Report (BNA) February 10, 2000 at E-1.

[5] *See* EEOC Reasonable Accommodation Guidance, Question 24. *But see, id.* Question 34 ("An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity.")

The Court of Appeals' *en banc* decision in this matter places human resource professionals between a proverbial "rock and a hard place" in working out accommodations that adversely affect the material or tangible (bargained-for or otherwise) expectations of others. Displacement of neutral policies such as seniority or awarding vacant positions to the most qualified employee vying for the assignment creates havoc in the workplace -- leaving large numbers of employees feeling that they have been treated arbitrarily -- and undermines the ADA's stated goals of equality and fairness.

Another Court of Appeals addressed the EEOC's parallel position that a reassignment or transfer request as a reasonable accommodation under the ADA takes precedence and must be granted if the individual with a disability is only minimally qualified for the position. In *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000), the Court of Appeals rejected the EEOC's approach bestowing favored status upon individuals with disabilities. The Seventh Circuit held that this approach was "affirmative action with a vengeance," and created a "hierarchy of protections for groups deemed entitled to protection against discrimination." *Id.* at 1027, 1029. The ADA did not expressly or implicitly create a hierarchy of groups protected under federal anti-discrimination law.

In *Humiston-Keeling*, the appellate court provided examples illustrating this precarious, but realistic, situation: A person from another protected group (perhaps even an individual with another disability, or a member of one or more other protected classes) with superior qualifications seeks the same position as a minimally qualified individual with a disability who requests reassignment to the position as a reasonable accommodation. *Id.* at 1027. The examples further assume that the employer has a nondiscriminatory policy of filling the position with the most qualified candidate. *Id.* at 1029. Passing over the more qualified person, the court reasoned, transforms the ADA from a nondiscrimination statute on a par with Title VII into an

unjustifiable mandatory preference law which imposes unreasonably on co-workers. *Id.* at 1029.[6]

The dilemma posited by the Seventh Circuit compounds the difficulty for an employer when the employee's disabled status is not obvious (as is often the case), since the ADA's confidentiality requirements bar the employer from divulging to the disappointed and more qualified (or equally qualified but more senior) employee that the successful transferee has a disability and/or is receiving a reasonable accommodation. The EEOC Reasonable Accommodation Guidance (Question 41) explains that, under the ADA's confidentiality requirements (42 U.S.C. § 12112 (d) (3) (B); 29 C.F.R. § 1630.14 (b) (1)), "[a]n employer may not disclose that an

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[6] In *Davis v. Florida Power & Light Co.*, 205 F.3d 1301 (11th Cir.), *cert. denied*, 121 S.Ct. 304 (2000), the court held that the employer need not honor a utility worker's reasonable accommodation request to circumvent seniority and be excused from mandatory overtime. The court held that contravening the seniority rights of other employees was unreasonable as a matter of law. *Id.* at 1307; *citing Willis v. Pacific Maritime Association*, 162 F.3d 561, 566-68 (9th Cir. 1998); *Feliciano v. Rhode Island*, 160 F.3d 780, 786-87 (1st Cir. 1998); *Aldrich v. Boeing Co.*, 146 F.3d 1265, 1271 n. 5 (10th Cir. 1998), *cert. denied*, 526 U.S. 1144 (1999); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998); *Kralik v. Durbin*, 130 F.3d 76, 83 (3d Cir. 1997); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 520 U.S. 1146 (1997); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114 (8th Cir. 1995). *See also EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001) ("The ADA does not require employers to penalize employees free from disability in order to vindicate the rights of disabled workers."); *Boersig v. United Electric Co.*, 219 F.3d 816 (8th Cir.), *cert. denied*, 121 S.Ct. 857 (2000); *Willis v. Pacific Maritime Association*, 244 F.3d 675 (9th Cir. 2001).

Moreover, the individual in *Davis* was no longer "qualified" to perform his existing job because he could not perform the required overtime work expected of any employee at his seniority level. *Id.* at 1305-06. In this sense, seniority or any other quantum of qualifications set under a neutral, non-discriminatory workplace policy may render an individual with a disability seeking a reassignment accommodation not fully "qualified" for the position.

employee is receiving a reasonable accommodation because this usually amounts to a disclosure that the individual has a disability." In a blithe understatement, the EEOC's response to Question 41 concedes that "responding to specific coworker questions might be difficult." From the view of the rejected employee, the employer's unexplained decision would appear as utterly arbitrary and unfair. Such perceptions hardly foster healthy labor-management relations. Rather, they poison the atmosphere of the workplace for all employees, with and without disabilities. Under this scenario and many others, the preferential practices recommended by the Ninth Circuit and the EEOC invite internal grievances, if not costly litigation.

As a practical matter, human resources professionals will be hard pressed to deny, without explanation, reassignments or favorable shifts earned by other employees by virtue of years of service or superior performance in deference to a new, unproven employee's request for a reasonable accommodation. Employers must always make an assessment of whether someone indeed has a "disability. However, when the displacement of the others' tangible interests is at stake, under the EEOC's approach the organization risks liability if it guesses wrong and provides the transfer accommodation to someone who does not in fact have a "disability" as defined by the ADA over a more senior individual or a more qualified individual from another protected class. SHRM members and human resource professionals should not have to choose between two potential lawsuits.

Another illustration highlights the problem with the EEOC's and Ninth Circuit's position. Suppose two employees with medical impairments apply for a transfer. Which one should the employer choose? Either employee could be a "person with a disability" under the Act, but it is also possible that neither one is. Under the EEOC's and Ninth Circuit's approach, the employer faces a Hobson's choice. If the employer awards the position to one of the employees as an accommodation, the other may sue and claim

that the first employee has no disability. Under the ADA's confidentiality requirements, the rejected employee may not even learn about the accommodation aspects of the selection until after litigation ensues. In the worst case scenario, a court will be forced to choose between two disabled employees, and the employer will be forced to suffer the costs of litigation. SHRM's approach avoids this situation altogether. Under this approach, the employer chooses the most qualified (and/or most senior) employee for the position. The employer makes the choice based on objective criteria, without regard to race, gender, national origin, disability status, or any other protected category. If an employee with a disability is the most qualified and is able to perform the functions of the position with or without reasonable accommodation, then that employee is awarded the position and the employer provides a reasonable accommodation necessary for the employee to perform the duties of the job.

Recognizing the rights and legitimate expectations of others is not a subterfuge for violating the ADA or an excuse barring consideration of other accommodation options. Human resource professionals recognize the challenge of protecting privacy and the accommodation interests of employees with disabilities against the illegitimate curiosity, fears, and possible resentment of the affected workforce. Accommodations that impose upon tangible interests of other employees, however, differ from accommodations that may merely inconvenience others. Upsetting the legitimate interests and rights of other employees should not become part and parcel of ADA compliance.

B. The *En Banc* Opinion and the EEOC's Guidance Conflict with Fundamental Principles Embodied in the ADA, Other Labor and Employment Laws, and Basic Workplace Tenets.

Although Congress never did so, the EEOC's positions and the Ninth Circuit's *en banc* decision attempt to place the needs and interests of employees with disabilities ahead of the rights of other employees belonging to a host of protected

classes -- the "affirmative action with a vengeance" to which the Seventh Circuit referred in *Humiston-Keeling*. This Court has repeatedly acknowledged the expertise of government agencies and the deference given such agencies in interpreting the laws they enforce. *See United States v. Mead Corp.*, No. 99-1434, 2001 U.S. LEXIS 4492 at 18 (U.S. June 18, 2001); *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) ("[t]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"), *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944); *Ford Motor Credit Co. v. Mihollin*, 444 U.S. 555, 565 (1980); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978). The EEOC's positions on this issue, however, call into question the degree of deference due. Courts of Appeals, including the Ninth Circuit in *Echazabal v. Chevron USA*, 226 F.3d 1063, 1069 (9th Cir. 2000), often reject the EEOC's guidance on ADA. *See also Davis v. Florida Power & Light Co.*, 205 F.3d 1301, 1307 n.10 (11th Cir.), *cert. denied*, 121 S.Ct. 304 (2000) (rejecting EEOC guidance on displacement of seniority in making reasonable accommodations). In the meantime, the human resource professional is left with the awkward dilemma of balancing competing rights against the EEOC's strained interpretations expanding ADA obligations.

This case provides a prime example of the human resource professional's dilemma when the EEOC interprets the ADA in a vacuum. The Ninth Circuit's ruling attacks a cornerstone of American working society -- seniority and the fundamental concept that the hardest working and most qualified person can and will succeed. Indeed, it undermines the ADA's guiding purpose, that persons be judged equally on the basis of merit.

Some performance measures may be subjective in nature and prone to debate over fairness in job selections. Few, however, will argue with the objective concept of seniority as a selection criterion. Seniority is recognized in many

workplace laws. For example, laws governing collective bargaining consider seniority, adjustments to seniority, and transfers to be "mandatory subjects of bargaining." *See e.g. Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953); *United States Gypsum Co.,* 94 N.L.R.B. 112 (1951); *The Developing Labor Law*, 887 (Patrick Hardin, et al. eds. 3d ed. 1992); *The Railway Labor Act*, 205 (Douglas Leslie, et al. eds. BNA 1995) (duty to bargain over pay, rules and working conditions under Railway Labor Act is interpreted broadly). Title VII of the Civil Rights Act of 1964 and other similar laws were founded on the principle that employment decisions should be made in a neutral environment that does not take into account a person's race, gender, national origin, religion, age, color, veteran or other protected status. Nothing is more inherently neutral as seniority. In fact, Title VII contains specific provisions declaring that determinations based on seniority do not violate the act:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system.

42 U.S.C. § 2000e-2(h).[7]

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[7] Although the ADA does not contain this particular provision of Title VII, the seniority provisions of Title VII arose from a very different historical perspective. The absence of this language is not determinative. *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1049 n. 13 (7th Cir. 1996). In addition, as the court in *Eckles* explained, ADA and its reasonable accommodation provisions are patterned after the Rehabilitation Act (which also does not expressly contain Title VII's explanation that adhering to a bona fide seniority system shall not be considered discrimination) and its precedent, under which reasonable accommodation rights do not trump other employees' seniority rights. *Id.* at 1047-48 (citations omitted). Moreover, courts of appeals note that ADA is substantively patterned after Title VII, and expressly follows Title VII's remedy and enforcement provisions. *E.g. Fox v. General Motors Corp.*, 247 F.3d 169, 175-76 (4th Cir. 2001) (citing other courts of appeals equating ADA and Title VII). The principle of respecting other employees' legitimate rights, including seniority and merit, runs with all of these anti-discrimination statutes.

Yet, the EEOC and the opinion below seek to upset this basic concept with their interpretation of the ADA's accommodation provisions. In essence, the EEOC's and the Ninth Circuit's *en banc* positions are that if a individual with a disability asks for a transfer as an accommodation, and is minimally qualified for the position, then the transfer must be made absent a showing of undue hardship. The EEOC would have the organization deviate from neutral criteria, passing over the most qualified or most senior person in order to advance the individual claiming the need for an accommodation. Again, this concept, taken to its extreme, could result in an employee with one day's seniority claiming disability, requesting an accommodation, and obtaining a transfer over employees with many years of seniority or vastly superior skills and experience.[8] This is not the result Congress envisioned, nor is it a logical or fair result here.

The EEOC's position is even internally inconsistent. The EEOC already recognizes that it is not "reasonable" under the ADA for the employer to bump existing employees from their current position.[9] In this sense, the EEOC acknowledges that existing employees have some underlying vested interest in their current position, an interest which another employee's disability does not trump. The EEOC

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[8] The EEOC Reasonable Accommodation Guidance explains that brand new employees are entitled to reassignment as a reasonable accommodation (yet applicants are not). *See* EEOC Reasonable Accommodation Guidance, Question 25.

[9] *See* EEOC Reasonable Accommodation Guidance, Question 24 ("The employer does not have to bump an employee from a job in order to create a vacancy . . .").

also recognizes that the ADA does not require employers to promote employees as an accommodation. That promotion, again, would trample on the vested interests of more qualified employees and applicants. Any promotions must be earned on a competitive basis.[10] Yet, the EEOC does not recognize that employees also have some inherent interest in shifts or transfers. Often, a transfer (while not a promotion) offers coveted benefits to the worker, such as a better shift or lighter or more rewarding work. The EEOC fails to consider these competing interests of the "affected" workforce unless their concerns and the level of disruption ascend to the level of an amorphous "undue hardship."

The EEOC's inconsistent interpretations frustrate human resource professionals' goals of promoting fairness, uniformity, and an environment free of discrimination, and instead seek to create a caste system favoring certain employees with disabilities. As shown, this system leaves management in an untenable position and sows the seeds of confusion and discord in the workplace. Finally, the EEOC's and the Ninth Circuit's interpretations thwart the efforts of employers who act in good faith and who in fairness attempt to comply with letter and spirit of other workplace laws.

C. ADA Requires Employees Seeking Accommodations to Make a Threshold Showing of "Reasonableness" Beyond Mere "Effectiveness."

The Ninth Circuit's *en banc* decision seeks to force employers to shoulder the burden of proving that compliance with neutral, non-discriminatory policies (such as seniority) renders the employer's efforts to implement conflicting

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[10] *See* EEOC Reasonable Accommodation Guidance, Question 24 ("Reassignment does not include giving an employee a promotion. Thus, an employee must compete for any vacant position that would constitute a promotion."). The Guidance also recognizes that special training beyond training normally provided to anyone hired or transferred to the position is not required.

accommodations an "undue hardship." This approach fosters irregular results and undermines the essential goals of seniority and other neutral, nondiscriminatory policies: consistency and predictability. This case presents the Court with an opportunity to articulate a clear rule regarding the quantum of proof which the ADA plaintiff must produce in order to meet the burden of establishing a "reasonable accommodation." SHRM commends to the Court the rule followed by several Courts of Appeals, as recently formulated by the First Circuit Court of Appeals in *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254 (1st Cir. 2001):

> In order to prove "reasonable accommodation," a plaintiff needs to show not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances. If the plaintiff succeeds in carrying this burden, the defendant then has the opportunity to show that the proposed accommodation is not as feasible as it appears but rather that there are further costs to be considered, certain devils in the details.

Id. at 244 F.3d 259. Other appellate courts have employed a like approach, including the D.C. Circuit, *Barth v. Gelb*, 303 U.S. App. D.C. 211, 2 F.3d 1180 (D.C. Cir. 1993)(interpreting the Rehabilitation Act) *cert. denied*, 511 U.S. 1030 (1994); the Fifth Circuit, *Riel v. Electronic Data Sys. Corp.*, 99 F.3d 678, 682-683 (5th Cir. 1996); the Sixth Circuit, *Hoskins v. Oakland County Sheriff's Dep't*, 227 F.3d 719, 728 (6th Cir. 2000); the Seventh Circuit, *Vande Zande v. Wisconsin Dep't of Administration*, 44 F.3d 538, 542-543 (7th Cir. 1995); and the Eleventh Circuit, *Willis v. Conopco, Inc.*, 108 F.3d 282, 285-286 (11th Cir. 1997).[11]

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[11] Another approach would shift the burden of persuasion from the plaintiff to the defendant, such that the plaintiff need only suggest the existence of an accommodation whose costs would not exceed its benefits,

The literal language of the ADA, in particular 42 U.S.C. § 12112(b)(5)(A),[12] makes clear that the plaintiff bears the burden of proving that the defendant could provide a reasonable accommodation for the plaintiff's disability. If the plaintiff succeeds in that task, the defendant then bears the burden of showing that the proposed accommodation would impose an undue hardship. While on occasion the same or similar proof may apply to the "reasonable accommodation" showing as to the "undue hardship" showing, fidelity to the statutory language demands that, for purposes of analysis, the two tests remain separate and distinct, with each party remaining at all times responsible for carrying its own burden.

Accordingly, in order to escape summary dismissal of a "reasonable accommodation" claim, the plaintiff must at least (1) propose an effective accommodation, *i.e.*, make a facial showing that an accommodation exists which would enable the plaintiff to perform his or her job; and (2) show that the proposed accommodation is reasonable, *i.e.* make a threshold showing that, from the employer's standpoint or even a neutral perspective, the accommodation is feasible in terms of cost and other factors. The term "reasonable," so familiar in legal usage, connotes the idea that, according to common sense and ordinary human experience, the facts as applied to appropriate legal standards indicate that the accommodation in question is not merely possible, but that it is plausible, considering all the facts and circumstances.

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on the face of things. *See Borkowski v. Valley Central School Dist.*, 63 F.3d 131, 138 (2d Cir. 1995); *Walton v. Mental Health* Ass'n, 168 F.3d 661, 670 (3d Cir. 1999). *See also Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999); *White v. York Int'l Corp.*, 45 F.3d 357, 361 (10th Cir. 1995). For the reasons stated herein, this approach strains the statutory language and produces equally uncertain results.

[12] That subsection defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability ... , unless [the] covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."

If the plaintiff fails to make such a showing, the analysis (and the case) ends. On the other hand, if the plaintiff does demonstrate that an accommodation is, on its face, effective for the employee and reasonable for the employer, then the ADA gives the employer the opportunity to prove that certain non-obvious factors mean that the proposed accommodation would impose an undue hardship. These will often involve factors within the employer's special knowledge of the inner workings of the business.

By way of example, it would obviously not be effective for a person using a wheelchair to request shorter hours for a job that requires patrolling rugged terrain on foot. In that case, it would waste the time of the litigants and court for the plaintiff to try to show that shorter hours are reasonable. Under all suggested approaches, including the EEOC's approach equating effectiveness with reasonableness, the plaintiff must meet a threshold test that the accommodation is effective.

Assuming the employee establishes the effectiveness of the proposed accommodation, the analysis moves to the next step: Is it objectively reasonable? For instance, if an employee with asthma proposes an accommodation that the employer move its operations to a distant region with a more favorable climate for the employee's condition, such an accommodation might be effective to assist the employee, but on its face such a requirement would be unreasonable (and unfair to other employees). The employer should not be required to prove undue hardship in that situation.

On the other hand, the employee might propose an accommodation in the form of relocating the employee's work station within an existing office. Such an accommodation might appear reasonable on its face in an office where, for example, work stations consist of identical cubicles in a large room. At that point, the employer might be able to show that in fact, such an arrangement imposes an undue hardship in that it disrupts the necessary flow of work from one space to another and materially affects productivity.

The EEOC takes the position that the employee only has the burden of showing that the proposed accommodation is effective. *See* EEOC Reasonable Accommodation Guidance ("[a] modification or adjustment satisfied the reasonable accommodation obligation if it is 'effective.'"). That rule makes no sense. As the First Circuit noted in *Reed*, 244 F.3d at 259 n.4, none of the circuits has adopted the EEOC's position on this point, and even in the Ninth Circuit's *en banc* decision in the present case, only a concurring position advocated this view. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1122-1123 (9th Cir. 2000). *See, e.g., Terrell v. USAir*, 132 F.3d 621, 626 (11th Cir. 1998) ("A plaintiff does not satisfy her initial burden by simply naming a preferred accommodation.").[13]

First, if Congress had simply meant "effective," it would have used the word "effective," or "reasonable to the employee," in the statute. Instead, it used the term "reasonable," with no indication that reasonableness is limited to effectiveness from the employee's perspective.

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[13] In other sections of its Compliance Manual, the EEOC itself impliedly acknowledges that "effective" and "reasonable" are two distinct terms. Otherwise the following statements (with emphasis added here) would involve redundancy: "[T]he employer should engage in an interactive process with the individual to determine an *effective reasonable accommodation*." EEOC Compliance Manual, Sec. 902.1 "Definition of the Term 'Disability.'" "Physical changes to the workplace or extra equipment also may be *effective reasonable accommodations* for some people." No. 224 BNA EEOC Compliance Manual Guidance: Psychiatric Disabilities and ADA, N:2338, "Selected Types of Reasonable Accommodation." "Supervisors play a central role in achieving *effective reasonable accommodations* for their employees." No. 222 BNA EEOC Compliance Manual, Psychiatric Disabilities and ADA, N: 2339, Question 26. "In some cases, the only *effective reasonable accommodation* available for an individual with a disability may be similar or equivalent to a light duty position." No. 216 BNA EEOC Compliance Manual, EEOC Enforcement Guidance: Workers' Compensation and the ADA, N:2276.

Further, using one of the above examples, under the EEOC's approach, the employee proposing that the entire office relocate would thereby meet the test of showing a reasonable accommodation. Under this view, the employee passes muster simply by articulating an idea for an accommodation, no matter how fanciful or outlandish to the employer and to the rights of the co-workers. If that were Congress' intent, Congress would not have used the modifier "reasonable" at all.

The facts of the present case dramatically illustrate the wisdom of SHRM's approach, and the impracticability of the EEOC's proposal. U.S. Airways should not have to prove an "undue hardship" under these circumstances. The terminology does not even fit this situation. Here, the proposed accommodation is not reasonable, as matter of law, because of the existence of a seniority system designed to promote fairness and consistency for all employees, including employees with disabilities.

The rule which SHRM advocates here serves larger purposes than those of the immediate case. While "reasonableness" is a broad term that varies with facts and circumstances, and issues of discrimination often involve subjective judgments, the goal of the law should be to seek out and apply objective rules where possible -- neutral, facially nondiscriminatory standards. This aids not only the courts, but also affords certainty and predictability to employers and employees alike. The employee thus has clear and consistent expectations, and the employer clear and consistent obligations.

This case involves a seniority system. A bona fide seniority system -- that is, one that has not been created for the purpose of discriminating against protected groups, whether created by a collective bargaining agreement or by the employer -- by its nature provides an objective criterion by which to confer employee preferences. There is normally no question as to how long an employee has worked for a particular employer, and no difficulty comparing different

employees' seniority. To allow that objective system to be superseded by an individual employee, whose condition, need, and abilities may be subject to debate, is to allow subjectivity to prevail over objectivity. Worse, it elevates the status of one employee, solely on the basis of a disability, over that of similarly situated employees who do not have the same disability. It converts a law designed to prevent discrimination into one that requires reverse discrimination.

This case involves an individual complainant seeking special preference, as against a system designed to afford fairness for all employees. The individual employee should not be in a position to challenge all other employees' legitimate aspirations merely by articulating an "accommodation," with no showing that the accommodation would be reasonable in light of these other factors.

CONCLUSION

The Court should resolve the inconsistencies among the courts below as well as the internal contradictions in the EEOC's own guidance on reasonable accommodations through a rule requiring individuals claiming denial of a reasonable accommodation to make a threshold showing that a "reasonable" accommodation exists, a showing which takes into account the known, tangible rights and aspirations of the "affected" workforce. This common sense approach is true to the ADA's ideal of mainstreaming individuals with disabilities into the workforce, and not isolating them as a special class. It also hedges against the uncertainty of employers proving that effective but wholly unrealistic accommodations constitute an "undue hardship."

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